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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

STEPHEN FLICK,

Petitioner,

vs.

WEDDINGTON PRODUCTIONS, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION TWO

PETITIONER'S REPLY BRIEF

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I

ARGUMENT

A. This Is A Copyright Case.

In its brief, Respondent admits that the "substance" of its claim consists of "stealing the Sound Library and using it in the motion picture 'Twister'." Respondent's Brief at 9. [Emphasis added.] "Use" of the Sound Library in editing "Twister", as proved at the contempt trial, consisted of reproducing the copyrightable sounds contained in the Sound Library and altering such sounds to create derivative works. Thus, the "substance" of Respondent's claim consisted of the exercise of the specific enumerated rights of a copyright proprietor under 17 U.S.C. §106.

While state law may provide a remedy in conversion for "stealing the Sound Library", this remedy

addresses only the right to possession of the tangible tapes of which the Sound Library consists. However, the Injunction adjudicated not only rights to possession of such tapes but also the right to reproduce and alter the copyrightable sounds embodied in such tapes.

> ... The mere act of reproduction does not constitute conversion because reproduction constitutes an interference with the intangible literary or artistic property right, not with the tangible property right in the chattel that is being reproduced. ...
>
> It is generally held that an action for conversion will lie only for wrongful possession of a tangible embodiment of a work, (for instance, its manuscript), whereas a copyright action must be

> brought for wrongful use of the intangible artistic property (for instance, a poem or other literary work) contained therein. If, however, contrary to the usual view of conversion, it is regarded as encompassing unauthorized reproduction, than the rights created are indeed "equivalent" to copyright, and state law is preempted. 1 *Nimmer on Copyright*, §1.01[B][1][i] at pages 1-39 - 1-41

Similarly, Weddington's trade secret cause of action cannot support the injunction.[1] Where "use" of an

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[1] It is undisputed that the Flick Parties had full knowledge and use of the Library prior to leaving Weddington for a period of many years. Thus, by taking a copy of the Library with them, there could not have been a disclosure to the Flick Parties of the Library, nor is it alleged that the Flick Parties disclosed the library to others. It is also not disputed that all of the parties to this litigation

alleged trade secret is at issue, as here, such claims are preempted. *Long v. Quality Computers and Applications, Inc.*, 860 F.Supp. 191, 197 (N.D. Pa. 1994) [Courts recognize two distinct types of misappropriation of trade secrets: Those based upon the use of a plaintiff's work and those based upon the disclosure of material that a defendant has a duty to keep confidential. (Citation) Typically, claims of the former type are preempted...] Accordingly, even if the Library constitute a trade secret and if the trade secret had not been fully disclosed, Weddington's claim for "use" of the Library would be preempted by the Copyright Act.

---

have "used" the Library for sound effects editing services for many years and, therefore, the Library, if a trade secret, was fully "disclosed" (if at all) prior to the Flick Parties' separation from Weddington. Thus, a trade secret claim based upon disclosure of secret material is not at issue. As Respondent admits, "use" of the Library, consisting of reproduction and alteration of the sounds contained therein, is the "substance" of its claim.

B. This Court Has Jurisdiction Under 28 U.S.C. §1257(a).

Under applicable California law, the contempt proceeding initiated against the Flick Parties was a separate, quasi-criminal proceeding independent of the underlying civil action in which the Injunction was issued. Unlike the appellate procedures available in the underlying civil action, there is no available appeal from an adjudication of contempt.

> The judgement and orders of the court or judge, made in cases of contempt, are final and conclusive. California Code of Civil Procedure §1222.

Petitioner sought review of his contempt

adjudication in the California Court of Appeal by Petition for Writ of Habeas Corpus, etc. and, after denial thereof, sought review in the California Supreme Court by Petition for Review, also denied. Accordingly, there is no further appellate procedure available within the California State Court system which can relieve Petitioner of his contempt adjudication.

Respondent argues that, because the validity of the injunction may be at issue in an appeal taken from the final judgment in the underlying civil action, "the California Supreme Court has not rendered a final judgment on the issue". Respondent's Brief at 13. This argument is incorrect because the outcome of an appeal from the final judgment in the underlying civil action cannot affect the final contempt adjudication in the separate quasi-criminal proceeding. Thus, even a

reversal of the trial court's issuance of the preliminary injunction will not relieve Petitioner of the contempt adjudication.

The United States Supreme Court has granted Certiorari in similar cases. See, *Local No. 438 Construction & Gen. Lab U. v. Curry*, 371 U.S. 542, 548, 83 S.Ct. 531, 9 L.Ed.2d 514 (1963). Here, the contempt adjudication in the separate quasi-criminal proceeding will survive regardless of the outcome on any appeal from the final judgment in the underlying civil action. Thus, this case satisfies the test of finality stated in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328, (1975), approving certiorari in cases "in which the federal issue, finally decided by the highest court in the State will survive and require decision regardless of the outcome of future state court

proceedings." *Cox, supra*, 420 U.S. at 480, 95 S.Ct. at 1038.

C. The Issue As To The State Court's Lack of Subject Matter Jurisdiction Was Not Waived.

Respondent argues that Petitioner failed "to raise the copyright claim" and "should have timely removed the case to federal court". However, subject matter jurisdiction is never waived and may be raised at any stage in the proceedings because a party's conduct cannot invest a court with subject matter jurisdiction which it lacks.

> The very nature of subject matter jurisdiction, as a required element distinct

> from that of jurisdiction of the parties, indicates that it cannot be conferred by consent, waiver or estoppel. 2 B.Witkin, California Procedure, *Jurisdiction*, §10 at p.374 (3d Ed. 1985).

Under California Law, issues as to subject matter jurisdiction may even be raised for the first time on appeal. *Consolidated Theaters v. Theatrical Stage Employees Union*, 69 Cal.2d 713, 721, 73 Cal.Rptr. 213, 447 P.2d 325 (1968).

With respect to the other arguments raised in Respondent's Brief in Opposition, Petitioner relies on its petition.

II.

CONCLUSION

The Petition should be granted.

DATED: June 11, 1997

Respectfully submitted,

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